Cite as 2011 Ark. 446

SUPREME COURT OF ARKANSAS

No. 09-1333

BANK OF AMERICA, N.A.
APPELLANT

V.

CHARLES A. BROWN, ROY LYNDELL SHARPE TESTAMENTARY TRUST, and ROY LYNDELL SHARPE INTER VIVOS TRUST
APPELLEES

Opinion Delivered October 27, 2011

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CN1993-4743]

HONORABLE VANN SMITH, JUDGE

REVERSED AND REMANDED WITH DIRECTIONS.

JIM HANNAH, Chief Justice

Bank of America, N.A., appeals the circuit court's order granting Charles A. Brown's petition to change the trustee of a testamentary trust and the trustee of an inter vivos trust. Bank of America alleges that the circuit court erred because Brown lacked standing to bring suit. Because we reverse on standing, appellant's remaining issues on appeal need not be addressed. Brown asserts on cross-appeal that the circuit court erred in granting a stay of the decision changing the trustees pending appeal. Because we reverse this case, the issue on cross-appeal is moot and will not be addressed. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(5) (2011).[1]

On March 9, 1990, Roy Lyndell Sharpe executed an inter vivos trust entitled the

[1]This case was certified to this court by the Arkansas Court of Appeals because one of the issues asserted by Bank of America concerned the practice of law; however, that issue was rendered moot by the decision on standing.

"Living Trust of Roy Lyndell Sharpe" and the "Last Will and Testament of Roy Lyndell Sharpe" containing a testamentary trust. Relevant to the present appeal, the inter vivos trust provides as follows:

> My Trustee shall employ my attorney, Charles A. Brown, for any legal matters or advice concerning the administration and distributions from this Trust, and his opinion shall be sufficient reasonable cause for the Trustee to act thereupon.
>
> . . . .
>
> The Trustee executing this Trust Agreement is anticipated to be the sole Trustee during the term of the Trust, but if some unforeseeable event forecloses the Worthen Bank and Trust Company, N.A., from administering the Trust, and such event occurs in the lifetime of my attorney, Charles A. Brown, then my attorney shall select the trust institution to continue to administer this Trust as Trustee. And, should such event occur after the demise of my named attorney, then a Court of competent jurisdiction shall select the trust institution to administer this Trust. In [the] event that Worthen Bank and Trust Company, N.A., resigns as Trustee, that the selection shall likewise be made by my attorney, or the Court.

The relevant testamentary trust language provides as follows:

> My Trustee may employ my attorney, Charles A. Brown, in my Trustee's discretion for any legal matters or advice concerning the administration of this Will and distributions from this Trust, and his opinion shall be reasonable cause for the Trustee to act thereupon. It is my intent that Worthen Bank and Trust Company, N.A., shall be the sole Trustee of this Trust, however, if because of any unforeseen event Worthen Bank and Trust Company, N.A., cannot administer this Trust from its Trust Department within the boundaries of the City of Little Rock, Arkansas, then my attorney, or in his absence any Court of competent jurisdiction, shall select the trust institution to continue to administer this Trust as Trustee.

According to both trusts, the settlor prefers his attorney Brown to be employed to provide legal advice regarding trust administration; the settlor also wants Brown to choose a successor trustee if the need arises. Throughout the years since the creation of the trusts, Brown has been retained by the trustees for various tasks such as filing the annual accounting. While Worthen Bank and Trust was intended to be the sole trustee of both trusts throughout

the life of the trusts, through a series of mergers over the years since 1990, Bank of America has now succeeded Worthen and serves as trustee of both trusts.

The terms of the testamentary trust require that the trust be administered by a trust department within the boundaries of Little Rock; however, the terms of the living trust do not. We remanded this case for clarification of whether the order granting Brown's petition applied to both the testamentary and the living trust. *See Bank of America, N.A. v. Brown*, 2010 Ark. 399. On remand, the circuit court found that the order applied to both trusts and that the settlor intended for both trusts to be administered in Little Rock, Arkansas, by an Arkansas bank.

By a letter dated February 27, 2009, Bank of America notified Brown that the trusts would be served by a "client team" located in Dallas, Texas. On March 30, 2009, Brown filed a "PETITION FOR ORDER CHANGING TRUSTEES" asserting that in violation of the terms of the trusts, Bank of America intended to manage the trusts from a location outside the boundaries of Little Rock. He further asserted that he had authority to bring the action and was entitled to select the new trustees. The circuit court found that "Charles A. Brown, as directed by Roy Sharpe, was justified in filing the Petition for Changing Trustees because of the move of management of the trust to Dallas, Texas. The Court finds that the Petition is granted and that Charles A. Brown is authorized to select the successor trustee."

Bank of America challenged Brown's standing in its motion to dismiss filed in response to Brown's petition to changes trustees and reasserted the issue in its motion for new trial. To have standing, a party must be a proper plaintiff. *See City of Dover v. City of Russellville*,

352 Ark. 299, 304, 100 S.W.3d 689, 693 (2003) (quoting David Newbern, *Arkansas Civil Practice and Procedure* § 5-15, at 62–63 (2d ed. 1993)). This requires an interest that has been adversely affected or right that has been invaded. *Id.*, 100 S.W.3d at 693. "A party has no standing to raise an issue regarding property in which he or she has no interest." *Wisener v. Burns*, 345 Ark. 84, 92, 44 S.W.3d 289, 294 (2001). Brown has no property interest in the trusts.

Under the Trust Code, the court, a settlor, cotrustee, or a beneficiary may initiate an action to remove a trustee. *See* Ark. Code Ann. § 28-73-706 (Supp. 2009). Such an action may result in a court order that would direct Brown, or alternatively the court itself, to select a new trustee. Brown is not the court, the settlor, or a co-trustee, and further, Brown is not a beneficiary under the trusts. Brown is identified in the trusts as the attorney that the settlor prefers to be used in administration of the trusts. "[A] direction to employ a named lawyer as attorney for the trustee is ordinarily intended merely to promote efficient administration of the trust rather than to confer a benefit on the lawyer." *Restatement (Third) of Trusts* § 48 cmt. b, at 237 (2003). His employment may be an incidental benefit, but a person who enjoys only an incidental benefit from the trust is not a beneficiary under the trust. *Restatement (Third) of Trusts* § 48 (2003). A person who is only an incidental beneficiary under a trust cannot enforce the trust. 2 Austin W. Scott et al., *The Law on Trusts* § 12.13, at 769 (5th ed. 2006).

However, Brown disagrees that section 28-73-706 is applicable and argues that because the trusts were created prior to enactment of the Trust Code this court should instead rely on

Arkansas Code Annotated section 28-69-403 (Repl. 2004). Section 28-69-403 provides that "[n]othing in this subchapter shall prevent revocation, modification, or termination of a trust pursuant to its terms, or otherwise in accordance with applicable law." The Trust Code provides that it applies to all trusts created before, on, or after September 1, 2005. *See* Ark. Code Ann. § 28-73-1106(a)(1) (Supp. 2009). However, regardless of the statute relied on, the terms of the trusts do not support Brown's claim that he may enforce the terms of the trusts. Brown asserts that "the terms of the trust prevail directing the change when the Trustee, Worthen, moves the trust administration from its Little Rock offices." The testamentary trust expressly states that it is to be administered by a bank in Little Rock, and the circuit court found that the settlor's intent was that both the inter vivos trust and the testamentary trust were to be administered by an Arkansas bank in Little Rock. Both trusts provide that should Worthen no longer be able to administer the trusts, Brown or, in the event Brown is unavailable, a court of competent jurisdiction is to select the trust institution to continue to administer this Trust as Trustee. The meaning of this language is clear. "When the terms of a trust are unambiguous, it is the court's duty to construe the written agreement according to the plain meaning of the language employed." *Bailey v. Delta Trust and Bank*, 359 Ark. 424, 432, 198 S.W.3d 506, 513 (2004). We agree with Brown's assertion that the terms of the trusts provide for the selection of a new trustee when the trust administration is moved from Little Rock. But Brown fails to recognize that the trusts do not provide a means for removing a trustee. Thus, Brown obtains no authority from the trusts to bring an action to change the trustees and has no interest in the trusts that grants him

standing and permits him to enforce the terms of the trusts. He lacked standing to bring the petition to change trustees.

Brown cross-appealed alleging that the circuit court erred in staying the order removing the trustees. Because the circuit court's order removing the trustees is reversed, Brown's cross-appeal is moot.

> As a general rule, appellate courts of this state will not review moot issues, as doing so would be to render an advisory opinion, which this court will not do. *See Kinchen v. Wilkins*, 367 Ark. 71, 238 S.W.3d 94 (2006). This court has said that "a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy." *Id.* at 74, 238 S.W.3d at 97. Nevertheless, this court recognizes two exceptions to the mootness doctrine: (1) issues that are capable of repetition, yet evading review and (2) issues that raise considerations of substantial public interest which, if addressed, might prevent future litigation. *See Kinchen*, *supra.*

Sanford v. Murdoch, 374 Ark. 12, 17, 285 S.W.3d, 620, 625 (2008). Neither exception to the mootness doctrine applies in this case; therefore, we decline to address Brown's cross-appeal. We reverse and remand this case with direction that upon remand the circuit court dismiss this case.